STILL A SAFE BET FOR CROSS BORDER INJUNCTIONS

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During the late 1990s, the Dutch were famous not only for their cheese, but also for their cross border injunctions. The court in The Hague, highly specialised in patent law, assumed jurisdiction in most cross border patent cases. The Hague would readily grant a cross border injunction when it judged the plaintiff to be right.

This changed when the Court of Justice of the European Union (CJEU) put an end to this practice in its 2006 *GAT-LuK* ruling. This ruling was based on the Convention of September 27, 1968, entitled Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It was then decided that only the judge of the country in which the patent is registered has jurisdiction relating to the registration or validity of a patent, irrespective of whether the issue is raised by way of an action or a plea in objection. This rule is based on the following arguments:

- First, it was determined that if a court in the main action relating to a patent, such as an infringement action or for a declaration of non-infringement, should give a judgment on the validity of the equivalent European patent in countries outside the Netherlands, this would indirectly establish the invalidity of the patent at issue, thereby undermining the binding nature of the rule of jurisdiction laid down in the Convention and circumventing its mandatory nature.
- Second, accepting such a possibility would multiply the heads of jurisdiction. This would undermine the predictability of the rules of jurisdiction laid down by the Convention. This would consequently undermine the principle of legal certainty, which is the basis of the Convention.
- Finally, allowing decisions within the scheme of the Convention, in which courts other than those of the patent-issuing member state rule indirectly on the validity of that patent, would multiply the risk of conflicting decisions which the Convention seeks to avoid.

This CJEU decision stopped the Dutch judge assuming jurisdiction for only a brief period of time. Only two months after the decision the Dutch judge ruled in the interim injunction case between Bettacare and H3 Products that in cases of urgent matters the judge would have jurisdiction in cross border patent cases and would be able to rule cross border injunctions. This was based on the urgent nature the case and the fact that nothing definitive would be said on the validity of a patent issued abroad.

In December 2010, the Dutch judge questioned whether this was truly the way the CJEU intended it to be. It therefore posed prejudicial questions on the interpretation of the Convention to the CJEU in the cross border patent case between Solvay and Honeywell. In the meantime the Dutch judge continued to assume jurisdiction in cross border interim injunction cases, irrespective of the IP nature of the case. In January 2011 the judge ordered in the case between Louis Vuitton and Ms Plesner, by way of an *ex-parte* injunction, the Danish defendant to refrain from infringing the Community Design rights of Louis Vuitton. Some months later, in the case between YMP and Yell, the court of appeal ruled that, notwithstanding an objection against the validity of a trademark, such an objection would have no impact on the assumption of jurisdiction nor on the power to rule on a cross border injunction. The judgment explicitly stated that the *GAT-LuK* rule is also applicable in IP cases other than those relating to patents. Further, it repeated that, unless the CJEU decides otherwise, cross border jurisdiction in interim injunction cases must be accepted. The most notorious example of this kind of ruling was made in August 2011 in the case between Apple and Samsung, when the judge in The Hague granted a cross border injunction in Germany.

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In the meantime there has been some progress in the case between Solvay and Honeywell. On March 29, 2012, the Advocate-General of the CJEU gave his conclusion. He considered the Dutch interpretation of the Convention in relation to cases of urgent matters to be, under some circumstances, the right interpretation. We believe this is a great step in support of the practice as conducted in the Netherlands, although it is not a final decision.

If the CJEU follows the AG, it would be a great boon for Dutch lawyers and their practice, as well as for patent owners seeking support in their actions throughout Europe. For the moment it is still the case that, when urgently seeking a cross border injunction, one can ask a Dutch judge with confidence. ■

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ALL SYSTEMS GO FOR DUTCH CROSS-BORDER INJUNCTIONS

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It almost goes without saying that the Dutch courts have always been very lenient when it comes to assuming jurisdiction and granting cross-border injunctions. As we have mentioned before, the court in The Hague had been seemingly thwarted in the *Solvay v Honeywell* case. The admissibility of this practice was questioned again and the Court of Justice of the European Union (CJEU) had the opportunity to rule on new questions. From the outset it was evident that the outcome of the case could either put an end to this practice or rule in favour of the Dutch courts and strengthen their competence. Either way, this decision would set clear lines.

The key facts of the case were as follows. Solvay, wishing to put an end to infringements of its European patents by the three Honeywell companies, sought provisional relief in the form of a cross-border injunction. Honeywell in turn raised the defence of invalidity of the national parts of the patent. The court in The Hague found itself stuck on a spider's web and referred questions to the CJEU for a preliminary ruling. Of particular relevance is the CJEU's reasoning that the court before which the interim proceedings have been brought does not make a final decision on the validity of the patent invoked—it only makes an assessment as to how the court, which has jurisdiction under Article 22(4), would rule.

We will now turn to the first question the CJEU had to answer. This dealt with the interpretation of Article 6(1) EEX (the EU Execution Regulation) and whether there was a risk of irreconcilable judgments resulting from separate proceedings. The CJEU's answer is not very surprising. According to the court, a situation where two or more companies from different member states are separately accused of infringing the same national part of a European patent, could indeed lead to irreconcilable judgments. It also emphasised that it is for the referring court to assess the existence of such a risk, taking into account all the relevant information.

The second question was rather more interesting. It is this question that determines the ambit of the competence of the Dutch court with regard to cross-border injunctions. In essence, the CJEU had to answer whether Article 22(4) EEX would preclude Article 31 of that regulation. Article 22 determines that: "Member states shall have exclusive jurisdiction [...] in proceedings concerned with the registration or validity of any European patent granted for that state".

In fact, Article 31 has a different subject matter. It applies to member states other than those over which the courts have jurisdiction over the substance, whereas Article 22 concerns courts with jurisdiction over the substance. If there is a likelihood that the patent would be declared invalid, the court before which the interim proceedings have been brought will refuse to adopt the sought provisional measure. In this way there is no risk of conflicting decisions, so Article 31 can be applied in these cases.

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The CJEU also pointed out that "in circumstances such as those at issue", Article 22(4) must be interpreted as not precluding Article 31.

This leaves room for discussion and further interpretation, although the outcome of this case is still striking. It has been clarified that even in cases where the defendant raises the invalidity of the national parts of a patent the Dutch court may still adopt the sought provisional relief. Therefore The Netherlands remains a highly attractive forum when seeking cross-border injunctions. ■

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A LIMITED BREEDERS EXEMPTION

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In September, the Netherlands welcomed a proposal for the introduction of a 'limited breeders exemption' into the patent law. The proposal concerns the modification of Article 53b of the Dutch Patent Act 1995.

Background

The increasingly important role of biotechnology led in 1998 to the adoption of Directive 98/44/EC on the legal protection of biotechnological inventions. As a result of this directive, biological material which possesses specific characteristics as a result of the claimed invention, is patentable. This also includes any identical biological material derived from that biological material through propagation or multiplication. In the Netherlands this directive has been implemented in the Dutch Patent Act 1995.

The entry of patent law into the plant breeding world has led to tension between the rights and interests of the patent holders and those of the breeders. This is because breeders want to use the plant material, which is protected by patent law, for further breeding, but can't do that without the consent of the patent holder in the form of a licence.

Breeders exemption under Dutch law

Dutch plant breeding law contains exceptions to the exclusive rights of the breeder. One of these exceptions, set down in Article 57 clause 3c of the Dutch Seeds and Planting Material Act, is known as the 'breeders exemption'. It is a limited exemption which gives breeders the right to use protected plant material for the purpose of breeding new varieties. The exemption is limited, because it does not extend to the commercial exploitation of the protected plant variety. For commercialisation a licence is required.

Research exemption in Dutch patent law

Dutch patent law has, until now, not contained a comparable clause. This means that breeders need a licence from the patent holder to use protected plant material for the purpose of further breeding.

Dutch patent law does, however, contain a 'research exemption' in Article 53 clause 3 of the Dutch Patent Act 1995. This exemption gives breeders, exclusively for research purposes, free access to patented plant material, in order to do experiments on that material. The exemption does not, however, extend to experiments with that material in order to breed new plant varieties.

Since access to patented plant material is necessary to encourage the development of new varieties of plants for the benefit of society, this situation is considered to be a problem. In addition, this topic has also been discussed in other European countries such as France, Switzerland and German, where patent laws already contain a so-called 'breeders exemption'.

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Introduction of the breeders exemption into Dutch patent law

In order to solve the problem, different solutions have been examined by regulators in the Netherlands. One of these solutions is the introduction of a breeders exemption into Dutch patent law. This could be either broad or limited in extent—the broad exemption would also extend to the commercialisation of the patented plant material. But this option could conflict with Directive 98/44/EC and the TRIPS Agreement, and would leave the patentee empty-handed.

The second option, the one favoured for the change in the law, concerns the 'limited breeders exemption'. This exemption extends only to the use of the patented material for the purpose of further breeding new varieties. To commercialise this plant material or the new variety incorporating the patented material, requires a licence. This option, therefore, benefits both the breeder and the patentee.

The proposal

It is proposed to add a new clause concerning the breeders exemption to Article 53b of the Dutch Patent Act 1995. This article concerns the exhaustion of patent rights and restricts the patentee's exclusive right to the patented plant material with respect to the use of the plant material for the purpose of breeding new plant varieties by breeders.

The clause makes it possible for breeders to experiment with patented plant material. The breeder no longer requires a licence to do so, but this does not extend to commercial exploitation. For that a licence is still required, so that the new clause does not leave the patentee with a useless patent. ■

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